

The UK Bribery Act: Long-Awaited Guidance Issued

31 March 2011

On 30 March, the United Kingdom Ministry of Justice issued long-awaited guidance for business organisations preparing for the implementation of the UK Bribery Act (the Act), now scheduled for 1 July 2011. The Act, passed in April 2010, initially was slated for implementation in October 2010, but its implementation has been delayed twice, first until April 2011 and then indefinitely, following criticism of its potentially sweeping effects and the uncertainty surrounding its application.

The purpose of the guidance is to help organisations understand the legislation and deal with the risks of bribery. As expected, the guidance brings some moderation to certain aspects of the Act. The guidance makes clear that “[t]he objective of the Act is not to bring the full force of the criminal law to bear upon well run commercial organisations that experience an isolated incident of bribery on their behalf,” and recognises that “no bribery prevention regime will be capable of preventing bribery at all times.” The guidance stresses a risk-based approach to managing bribery risks and the implementation of procedures that are proportionate to such risks.

Section 7 of the Act creates a new form of liability for failing to prevent bribery on behalf of a commercial organisation. However, the organisation will have a full defence if it can show that it had “adequate procedures” in place to prevent persons associated with it from committing bribery. The guidance identifies and elaborates upon six principles that should inform commercial organisations about the meaning of “adequate procedures”: (1) procedures that are proportionate to the bribery risks an organisation faces; (2) top-level commitment within the organisation; (3) periodic, informed, and documented risk assessment; (4) due diligence to mitigate identified bribery risks; (5) internal and external communication, including training; and (6) monitoring and review of procedures, including improvements where necessary.

In addition, the guidance addresses concerns voiced by business organisations regarding promotional expenditures, clarifying that it is not the intention of the Act to criminalise bona fide hospitality and promotional expenditures that seek to improve the image of a commercial organisation, better present products and services, or establish cordial relations.

Notwithstanding prior speculation to the contrary, the guidance reaffirms that facilitation payments—small bribes paid to facilitate routine government action—are not exempted from the Act’s prohibitions. However, the guidance recognises that such payments are the reality in some sectors and parts of the world, and emphasises the need for prosecutorial discretion in cases of facilitation payments.

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